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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PROGRESSIVE CASUALTY
INSURANCE COMPANY

Case No. 2: 12-cv-00665-KJD-PAL

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER OF
SILVER STATE BANK; COREY L.
JOHNSON; DOUGLAS E. FRENCH;
GARY A. GARDNER; and TIMOTHY S.
KIRBY

Defendants.

**PLAINTIFF PROGRESSIVE CASUALTY INSURANCE
COMPANY'S SUPPLEMENTAL BRIEF CONCERNING UNRESOLVED
ISSUES ADDRESSED IN ITS MOTION FOR A PROTECTIVE ORDER AND
DEFENDANT FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER OF SILVER STATE BANK'S, MOTION TO COMPEL**

Pursuant to the Court's September 24, 2013 Order [DE 105], Plaintiff Progressive Casualty Insurance Company ("Progressive"), by and through its undersigned counsel, respectfully submits this Supplemental Brief Concerning Unresolved Issues Addressed in its Motion for a Protective Order [DE 79] and Defendant Federal Deposit Insurance Corporation, as Receiver of Silver State Bank's ("FDIC-R"), Motion to Compel [DE 86] (collectively the "Discovery Motions").

I. Background

As the Court is aware, this is a contract action addressing the operation of a D&O liability insurance policy issued by Progressive to Silver State Bank to a claim asserted by the FDIC-R against former directors and officers of the bank. Although actions such as this frequently are resolved based on the application of the contract language to the facts of the claim—as Progressive believes this action ultimately will be—the FDIC-R here insisted that discovery is necessary, and the Court has allowed discovery to proceed.

On June 11, 2013, the Court held a hearing on the Discovery Motions filed by Progressive and the FDIC-R. During that hearing, the Court ordered the parties to further meet and confer in an effort to resolve the issues addressed in the Discovery Motions. The parties have spent substantial time since then attempting to resolve as many of the issues addressed in the Discovery Motions as possible, and they believed they had reached an agreement in principle as to all but one of those issues as of the last hearing on this matter on September 24, 2013. However, it has become apparent as the parties have attempted to document their agreement that the significant burden Progressive has expressed a willingness to bear in order to resolve these issues—which Progressive does not believe it should be required to bear—is not enough to satisfy the FDIC-R. Therefore, although the parties have

1 been able to resolve certain issues, it appears that it is necessary for the Court to resolve
2 others.¹

3 The FDIC-R's approach to the discovery issues in this matter is consistent with the
4 FDIC's approach to discovery generally in the seven similar declaratory judgment ("DJ")
5 actions in which Progressive and the FDIC are involved. It has become apparent recently
6 that the FDIC is intent on a scorched-earth approach to discovery in the DJ actions. The
7 FDIC has issued largely duplicative discovery to Progressive in each of the actions seeking
8 many of the same documents and information and, so far, has issued more than thirty third-
9 party subpoenas.² The FDIC's counsel in this and one other matter involving similar issues
10 have provided ESI search terms to Progressive that have retrieved a total of 480,000
11 individual documents, each of which must be reviewed for relevance, privilege, and/or
12 confidentiality. Progressive's counsel has a team of eight attorneys working full time on this
13 review. Recently, the FDIC's counsel in two other pending actions provided separate lists of
14 search terms, many of which are designed to retrieve the same documents as search terms
15 already provided by the FDIC in this matter.

16 **II. FDIC-R Is Not Entitled to Irrelevant and Privileged Reinsurance Material**

17 The one issue with respect to which Progressive and the FDIC-R were unable to reach
18 even an agreement in principle concerns the FDIC-R's request for reinsurance information
19 and communications. Therefore, pursuant to the Court's September 24, 2013 order [DE
20 105], Progressive provides the following summary of its position concerning this issue.³

21
22 ¹ Progressive has advised the FDIC-R of its willingness to continue trying to reach agreement on the remaining
23 issues prior to the October 29, 2013 hearing on this matter. Although the FDIC-R's counsel has also expressed
24 such willingness in theory, he has also expressed skepticism that further agreement is possible.

25 ² Four of the FDIC's recent subpoenas are directed to Progressive's reinsurers. These subpoenas were issued in
26 New York on October 1, 2013 in the declaratory judgment action pertaining to Omni National Bank.
27 *Progressive v. FDIC, as Receiver of Omni National Bank, et al.*, No. 1:12-cv-01103-RLV (N.D. Ga.).
Progressive and the reinsurers either have provided or shortly will provide the FDIC's counsel in the Omni
matter with their objections to these subpoenas.

³ Progressive provides this summary for the Court's convenience. It is not intended to supersede or replace
Progressive's earlier briefing concerning the Discovery Motions [DE 79, 91].

1 As a threshold matter, although the FDIC-R is not entitled to discovery of much of
2 the reinsurance material it seeks, Progressive has produced, and will continue to produce,
3 non-privileged communications with reinsurers concerning the Progressive D&O policy
4 generally, the drafting history of the policy form and pertinent provisions, including a
5 2004/2005 revision to the policy, and the meaning, interpretation, application, and use of the
6 policy provisions at issue in this matter. Progressive is in the process of reviewing the
7 480,000+ ESI documents retrieved by search terms provided by the FDIC-R in order to
8 identify any such communications.

9 It Item 10 in the FDIC-R's 30(b)(6) deposition notice to Progressive, the FDIC-R
10 requests testimony concerning "any communications with any reinsurer about" all claims
11 "for Policy Nos. 007849-03 and 007849-04." The FDIC-R's requests for production contain
12 similar requests. Request No. 17 seeks "[a]ll documents relating to the purchase, placement
13 or ceding or any reinsurance by you that relate to the Policy, including all status reports
14 provided by you to such reinsurance companies and memoranda relating to meetings with
15 reinsurers." Request No. 37 seeks "[a]ll documents relating to any communications with any
16 reinsurer about the Claims." As discussed in Progressive's Motion for a Protective Order
17 [DE 79, § V.A] and its Consolidated Reply in Support of Motion for a Protective Order and
18 Response to FDIC-R's Motion to Compel [DE 91, § II.E.1], FDIC-R is not entitled to
19 discovery of the claim-specific reinsurance material it seeks.

20 **A. Reinsurance Material is Not Relevant**

21 The reinsurance material the FDIC-R seeks is not relevant to any party's claim or
22 defense or to the subject matter involved in this action. As a threshold matter, in addition to
23 its file related to the FDIC-R's claim against the Ds & Os, Progressive opened a total of six
24 claim files with respect to the policies referenced by the FDIC-R. Those are completely
25 separate claims that have nothing to do with the FDIC-R's claim. As such, any reinsurance
26 material pertaining to those separate claims has absolutely no bearing on the question of
27

1 whether the Progressive Policy at issue in this matter provides coverage for the FDIC-R's
2 claim against the Ds & Os.

3 As for the FDIC-R's claim against the Ds & Os that underlies this matter, as
4 numerous courts have held, reinsurance material regarding this claim also is irrelevant to the
5 resolution of the sole question presented. For example, in a similar coverage action
6 involving another failed bank in the U.S. District Court for the Northern District of Georgia,
7 the FDIC sought to compel similar discovery of reinsurance material from the failed bank's
8 D&O insurer. *Federal Deposit Ins. Corp. as Receiver of Silverton Bank, N.A. v. Bryan*, No.
9 1:11-cv-02790-JEC-GGB, slip op. at 26–27 (N.D. Ga. filed Nov. 28, 2012) (“*Silverton*”).
10 The court denied the FDIC's motion to compel, holding that “any reinsurance agreements or
11 reinsurance-related communications are not relevant to the interpretation of the [D&O policy
12 at issue].” *Id.*; see also, e.g., *Am. Med. Sys., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh,*
13 *Inc.*, No. CIV. A. 98-1788, 1999 WL 781495, at *1–2 (E.D. La. Sept. 29, 1999) (holding that
14 reinsurance information was not relevant to a coverage dispute); *Flintkote Co. v. Gen. Acc.*
15 *Assur. Co. of Can.*, No. C 07-1827, 2009 WL 1457974, at *5–6 (N.D. Cal. May 26, 2009)
16 (“Generally, courts have chosen to deny discovery of reinsurance because it was irrelevant
17 and based solely on business considerations”); *Great Lakes Dredge & Dock Co. v.*
18 *Commercial Union Assur. Co.*, 159 F.R.D. 502, 503–04 (N.D. Ill. 1995) (holding that “the
19 relevance of ‘all documents’ relating to reinsurance is too attenuated to be discoverable under
20 the relevant evidence standard of Rule 26”); *Potomac Elec. Power Co. v. Cal. Union Ins.*
21 *Co.*, 136 F.R.D. 1, 2 (D.D.C. 1990) (holding that mere speculation that correspondence with
22 a reinsurer could contain admissions of coverage did not make communications with a
23 reinsurer relevant); *Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 106, 115 (D.N.J. 1989)
24 (holding that the relevance of reinsurance information was “very tenuous” and denying
25 discovery of such information); *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 117
26 F.R.D. 283, 288 (D.D.C. 1986) (denying discovery of reinsurance information on the basis of
27 “very tenuous” relevance to the issue of policy coverage); *Karta Indus., Inc. v. Ins. Co. of the*

1 *State of Pa.*, 685 N.Y.S.2d 685, 685 (N.Y. App. Div. 1999) (affirming trial court's ruling that
2 reinsurance materials were not relevant).

3 Unlike *Olin Corp. v. Continental Casualty Co.*, No. 2:10-cv-00623-GMN-RJJ, 2011
4 WL 3847140 (D. Nev. Aug. 30, 2011) ("*Olin*"), on which the FDIC-R relies and which we
5 discuss below, the circumstances of *Silverton* are substantially similar to the circumstances of
6 this matter, and the court there denied the FDIC's motion to compel production of such
7 documents, and Progressive respectfully submits that this Court should do the same.

8 The FDIC-R relies heavily on *Olin*. However, *Olin* is distinguishable from this
9 matter and does not support the FDIC-R's position. A central issue in *Olin* was whether the
10 insured had provided the insurer with sufficient information in its proof of loss for the insurer
11 to make a coverage determination. 2011 WL 3847140 at *1, 3-5. Thus, the court concluded
12 that reserve and reinsurance information was relevant "because it could show evidence of
13 [the insurer's] initial evaluation of the sufficiency of [the insured's] proof of loss" and the
14 insured's "satisfaction of contractual prerequisites, which [were] affirmative defenses raised
15 by [the insurer]." *Id.* at *4-5. No similar issues are presented in this matter, and *Olin* is
16 therefore inapposite.

17 The FDIC-R has asserted that "as in *Olin*" "Progressive has alleged a failure to fulfill
18 a contractual prerequisite by claiming that three of the defendants' claims were untimely."
19 (FDIC-R Brief at 21). However, this simply is wrong. Progressive does not assert the breach
20 of a contractual prerequisite by any of the Ds & Os. Rather, as reflected in Count III of
21 Progressive's Complaint [DE 1], Progressive asserts that two of the four defendants in the
22 FDIC-R's underlying lawsuit are not entitled to coverage under the Progressive Policy
23 because no claim was first made against them during the Policy's policy period or discovery
24 period. Thus, the issue is not whether these two Ds & Os provided timely notice to
25 Progressive of the FDIC-R's claim, *i.e.*, satisfied this "contractual prerequisite" to coverage.
26 The issue simply is whether the FDIC-R's claim against the Ds & Os was first made at a time
27

1 that it potentially would come within the Policy's insuring agreement. This is a legal issue,
2 not a factual dispute about what information was provided to Progressive.

3 **B. Reinsurance Material is Proprietary and Highly Confidential, and**
4 **Disclosing It Would Reveal Information Protected by the Attorney-Client**
5 **Privilege and/or Work-Product Doctrine**

6 In addition to the lack of relevance, requiring Progressive to provide the reinsurance
7 material the FDIC-R seeks would invade the attorney-client privilege and the work-product
8 doctrine. Although there may be circumstances in which communications between an
9 insurer and reinsurer regarding a claim would not be privileged, that is not the case here.
10 Progressive retained counsel to assist it with matters involving Silver State in or about June
11 2008, prior to the bank's failure on September 5, 2008. As such, from the first moment
12 Progressive was advised of the possibility of a claim by the FDIC-R against certain of the
13 Bank's former directors and officers in late 2008, Progressive's counsel has been providing
14 legal advice and analysis concerning the FDIC-R's potential claim, as well as the claim the
15 FDIC-R eventually brought. As such, to the extent that Progressive may have shared with its
16 reinsurers any analysis of the Ds' & Os' potential liability to the FDIC-R and/or the coverage
17 issues addressed in this action, such analysis would necessarily include or reflect legal advice
18 and analysis provided to Progressive by its counsel. Thus, the FDIC-R should not be allowed
19 to inquire into any communications between Progressive and its reinsurers regarding the
20 FDIC-R's claims on this additional basis.⁴ See, e.g., *Lipton v. Superior Court*, 56 Cal. Rptr.
21 2d 341, 352 (Cal. Ct. App. 1996) ("[W]here reinsurance documents include attorney-client or
22 protected work product communications they would be entitled to the same privilege
23 protection as would similar communications between the ceding insurer and its attorneys
24 handling the insured's claim.... Similarly, where the requested documents contain
25 confidential commercial information a qualified privilege would be available to protect the
26 documents unless the party requesting discovery can demonstrate a basis for overcoming

27 ⁴ Again, the same is true with respect to any communications Progressive may have had with its reinsurers regarding other claims made under the referenced policies.

1 such privilege.”). Further, to the extent the courts in the cases cited by the FDIC-R
2 concluded that reinsurance information was not privileged under the particular circumstances
3 of those cases, that does not lead to the conclusion that the FDIC-R should be allowed to
4 delve into privileged matters here. It should not.

5 **III. Other Issues**

6 As noted above, although Progressive believed that the parties had reached an
7 agreement concerning the other issues addressed in the Discovery Motions, as the parties
8 advised the court during the September 24, 2013 hearing, the parties have been unable to
9 finalize a written agreement with respect to the majority of those other issues. Progressive
10 therefore provides the following summary of its position with respect to each of these issues,
11 as well as what Progressive advised the FDIC-R it is prepared to do with respect to them as
12 part of an overall agreement.⁵ Notwithstanding the substantial compromises Progressive has
13 offered in an attempt to resolve these issues, as set forth in Progressive’s original briefs
14 [DE 79, 91], it remains Progressive’s position as a threshold matter that the FDIC-R is not
15 entitled to any of the discovery it seeks and that the Court should grant Progressive’s motion
16 for a protective order and deny the FDIC-R’s motion to compel in their entirety.

17 **A. Other Claims⁶**

18 The FDIC-R seeks discovery concerning claims opened since January 1, 2004 under
19 any Progressive D&O policy issued to a financial institution that resulted in payment by
20 Progressive for defense or indemnification and that involved issues similar to those involved
21 in this matter. Although Progressive has been able to identify 526 claims that resulted in
22 such a payment, it remains Progressive’s position that the FDIC-R is not entitled to this
23 discovery for the reasons set forth in its earlier briefing (DE 79, § II; DE 91; § II.B). The
24 burden associated with retrieving and reviewing the files associated with these 526 claims

25 ⁵ Again, the following summary is not intended to supersede or replace Progressive’s earlier briefing concerning
26 the Discovery Motions (DE 79, 91).

27 ⁶ Sections III.A to III.H address the FDIC-R’s requests for production and related motion to compel.
Progressive’s motion for a protective order is addressed in Section III.I below.

1 outweighs any potential relevance and any possible benefit the FDIC-R may derive from this
2 discovery. Nonetheless, Progressive has advised the FDIC-R that it would be amenable to
3 the process set forth in Section I of Exhibit 1 hereto.

4 **B. Other Lawsuits**

5 The FDIC-R also seeks discovery concerning claims in which lawsuits were filed by
6 or against Progressive since January 1, 2004 concerning a Progressive D&O policy issued to
7 a financial institution that involved issues similar to those involved in this matter. It remains
8 Progressive's position that the FDIC-R is not entitled to this discovery for the reasons set
9 forth in its earlier briefing (DE 79, § I; DE 91, § II.A). Nonetheless, Progressive has advised
10 the FDIC-R that it would be amenable to the process set forth in Section II of Exhibit 1.

11 **C. Claims Manuals and Policies and Procedures Regarding the**
12 **Investigation, Defense, Resolution, and Settlement of Insurance Claims**

13 It remains Progressive's position that the FDIC-R is not entitled to discovery of these
14 materials for the reasons set forth in its original briefs on the Discovery Motions. (DE 79,
15 §§ III, V.B; DE 91, §§ II.C, II.E.2). However, the FDIC-R and Progressive have reached an
16 agreement with respect to the FDIC-R's request for these materials.

17 **D. Progressive's Document Retention Policy**

18 It remains Progressive's position that the FDIC-R is not entitled to discovery of these
19 materials for the reasons set forth in its original briefs on the Discovery Motions. (DE 79,
20 § IV; DE 91, § II.D). However, it appears that the FDIC-R and Progressive have reached an
21 agreement with respect to the FDIC-R's request for these materials. Progressive has not yet
22 received written confirmation of this from the FDIC-R, though, and therefore reserves the
23 right to address this further during the October 29, 2013 hearing should the need arise.

24 **E. Reserve Information**

25 The FDIC-R seeks information concerning Progressive's reserves. As set forth in
26 Progressive's original briefs, the FDIC-R is not entitled to this information. (DE 79, § V.A;
27 DE 91, § II.E.1). During the June 11, 2013 hearing on the Discovery Motions, the Court

1 advised the parties that the Court is not inclined to order Progressive to produce the
2 information concerning its reserves the FDIC-R seeks. Progressive respectfully requests that
3 the Court formalize its statement to the parties and enter an order barring the FDIC-R from
4 seeking discovery of reserve information. Further, the FDIC-R should not be permitted to
5 withdraw its request for reserve information or its related motion to compel in order to avoid
6 an adverse ruling on this issue.

7 **F. Communications Regarding Progressive's Other Insureds**

8 For the reasons set forth in Progressive's original briefs on the Discovery Motions, it
9 remains Progressive's position that the FDIC-R is not entitled to discovery concerning
10 communications regarding Progressive insureds other the entities and individuals insured
11 under the policy at issue in this matter. (DE 79, § VI; DE 91, § II.F). Nonetheless,
12 Progressive has advised the FDIC-R that it would be amenable to the compromise set forth in
13 Section III of Exhibit 1 hereto.

14 **G. Regulatory Filings**

15 The FDIC-R seeks discovery of Progressive's regulatory filings and related
16 communications in all 50 states and the District of Columbia. Progressive has agreed to
17 produce its Nevada regulatory filings and related communications. As set forth in
18 Progressive's original briefs, the FDIC-R is not entitled to discovery of Progressive's
19 regulatory filings and related communications in other states. During the June 11, 2013
20 hearing, the Court advised the parties that the Court is not inclined to order Progressive to
21 produce non-Nevada regulatory filings and related communications. Progressive respectfully
22 requests that the Court formalize its statement to the parties and enter an order barring the
23 FDIC-R from seeking discovery of non-Nevada regulatory filings and related
24 communications. Further, the FDIC-R should not be permitted to withdraw its request for
25 reserve information or its related motion to compel in order to avoid an adverse ruling on this
26 issue.

H. Relevance

Pursuant to Rule 26(b)(1), the FDIC-R

may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

Fed. R. Civ. Pro. 26(b)(1). Further, “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” *Id.* Progressive has advised the FDIC-R that the things Progressive has expressed a willingness to do in an effort to resolve the issues raised in the Discovery Motions are subject to the caveat that Progressive is not required to produce any documents or information that are not within the scope of permissible discovery as set forth in Rule 26(b).

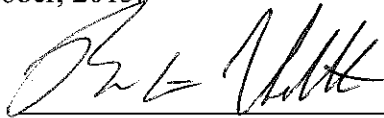
I. Progressive's Motion for a Protective Order

It is Progressive's understanding that the FDIC-R is willing to withdraw its deposition notice to Progressive that is the subject of Progressive's Motion for a Protective Order, subject to a reservation of its right to issue a new notice at some point in the future. Except as it pertains to the FDIC-R's requests for testimony concerning reserve and reinsurance information, discussed in Sections II and III.E above, which Progressive requests the Court address at this time, Progressive is amenable to this as set forth in Section IV of Exhibit 1 hereto.

III. Conclusion

For all the reasons set forth in Progressive's earlier briefing and summarized above, Progressive respectfully renews its request that the Court enter an order granting Progressive's Motion for a Protective Order and denying the FDIC-R's Motion to Compel. In the alternative, Progressive respectfully requests that the Court order the Parties to proceed with discovery as set forth above and in Exhibit 1 hereto.

Respectfully submitted this 15th day of October, 2013.



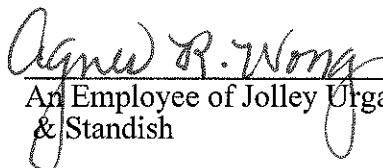
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 15th day of October, 2013, I caused a copy of the foregoing **Plaintiff Progressive Casualty Insurance Company's Supplemental Brief Concerning Unresolved Issues Addressed In Its Motion For A Protective Order And Defendant Federal Deposit Insurance Corporation, As Receiver Of Silver State Bank's, Motion To Compel** to be electronically served upon all attorneys of record in this action.



An Employee of Jolley Urga Wirth Woodbury
& Standish

EXHIBIT “1”

Progressive's Supplemental Brief – Exhibit 1

I. Other Claims

As noted in Section II.A of Progressive's supplemental brief, Progressive has advised the FDIC-R that it would be amenable to the following with respect to the FDIC-R's requests for discovery concerning claims opened since January 1, 2004 under any Progressive D&O policy issued to a financial institution that resulted in payment by Progressive for defense or indemnification and that involved issues similar to those involved in this matter:

FDIC-R seeks discovery concerning claims opened since January 1, 2004 under any Progressive D&O policy issued to a financial institution that resulted in payment by Progressive for defense or indemnification and that involved any of the following "Claim Issues":

1. the claim involved alleged damages that could be construed as "any unpaid, unrecoverable or outstanding loan, lease or extension of credit to any customer or any forgiveness of debt;"
2. the person or entity asserting the claim was not an **Insured, Insured Person, or Company**, as those terms are defined in the Progressive policy form, and the claim involved an assertion by Progressive that it was barred or could be barred by the insured versus insured exclusion; or
3. the claim was brought by a regulatory body, such as the Federal Deposit Insurance Corporation or a state regulatory agency, in its capacity as conservator or receiver of a bank or by a trustee.

Progressive has identified 526 claim files involving a D&O policy opened since January 1, 2004 that resulted in payment by Progressive (the "Payment Claims").

With respect to each of the Payment Claims, Progressive will review the following documents, to the extent they exist for the respective Payment Claims and to the extent they are available in the Progress system for the respective Payment Claims: (1) Notice of Potential Claim Form or Initial Memo to File; (2) New Claim Form; (3) Complex/Highly Complex Claims Summary or Report; (4) Potential Serious Loss Memo; (5) Claim Closing Memos; and (6) memos summarizing visits to insureds (the "Progress Documents"). Progressive will provide to FDIC-R a list of all Progress Documents reviewed with respect to each of the Payment Claims.

If, based on this review of the Progress Documents, Progressive determines that one or more of the Payment Claims appears to have involved any of the Claim Issues set forth above, Progressive will review the entire paper and electronic claim

1 file for such claim(s). If Progressive is unable to determine from the Progress
2 Documents whether a claim involved any of the Claims Issues, Progressive will
3 notify FDIC-R of the number of claims in which it was unable to make such
determination and the parties will confer regarding what additional steps, if any, will
be taken with respect to those Payment Claims.

4 Progressive will also undertake the following in order to identify Payment
5 Claims that may have involved any of the Claim Issues set forth above. Progressive
6 and/or ABA Insurance Services Inc. ("ABAIS"), its managing general agent, will
7 send an email to: (1) senior management at ABAIS; (2) personnel in the claims
8 department at ABAIS; (3) personnel in the underwriting department at ABAIS; and
9 (4) Progressive personnel involved in the handling of claims pertaining to its financial
10 institutions D&O business asking them to identify any claims involving the Claim
11 Issues of which they are aware. This email can be sent in conjunction with the email
12 sent in relation to Section II below. Progressive will ensure that a response is
received from each person to whom the email is sent confirming or denying any
knowledge relating to the existence of such claims. Progressive will advise FDIC-R
when all such persons have responded. However, Progressive will not produce any
such responses to FDIC-R. With respect to any claim(s) identified through this
process, Progressive will review the entire paper and electronic claim file for such
claim(s).

13 If, based on further review of the paper and electronic claim files, Progressive
14 determines that one or more of the Payment Claims did, in fact, involve any of the
15 Claim Issues Progressive will produce non-privileged portions of the claim file for
16 such claim(s) to FDIC-R and will provide a log identifying any documents withheld
17 or redacted from such file(s) on the basis of privilege. Progressive may redact from
18 all documents produced identifying information pertaining to Progressive's Other
Insureds. If Progressive does so, though, Progressive will identify the documents in
such a way as to allow FDIC-R to determine which documents pertain to a particular
claim.

19 Should FDIC-R obtain additional information identifying claims that involve
20 the Claim Issues, FDIC-R reserves the right to request the production of documents
relating to those claims. Progressive reserves the right to object to any such requests.

21 **II. Other Lawsuits**

22 As noted in Section II.B of Progressive's supplemental brief, Progressive has advised
23 the FDIC-R that it would be amenable to the following with respect to the FDIC-R's requests
24 for discovery concerning claims in which lawsuits were filed by or against Progressive since
25 January 1, 2004 concerning a Progressive D&O policy issued to a financial institution that
26 involved issues similar to those involved in this matter:
27

FDIC-R seeks discovery concerning claims in which lawsuits were filed by or against Progressive since January 1, 2004 concerning a Progressive D&O policy issued to a financial institution that involved one or more of the following "Litigation Issues":

1. the claim involved alleged damages that could be construed as "any unpaid, unrecoverable or outstanding loan, lease or extension of credit to any customer or any forgiveness of debt, and Progressive denied coverage or issued a reservation of rights addressing this;"
2. the person or entity asserting the claim was not an **Insured, Insured Person, or Company**, as those terms are defined in the Progressive policy form, and Progressive denied coverage or issued a reservation of rights based on the Insured vs. Insured exclusion; or
3. the claim was brought by a regulatory body, such as the Federal Deposit Insurance Corporation or a state regulatory agency, in its capacity as conservator or receiver of a bank or by a trustee, and Progressive denied coverage or issued a reservation of rights with respect to the claim.

Progressive will undertake the following in order to identify such "Litigation Claims." Progressive and/or ABA Insurance Services Inc. ("ABAIS"), its managing general agent, will send an email to: (1) senior management at ABAIS; (2) personnel in the claims department at ABAIS; (3) personnel in the underwriting department at ABAIS; and (4) Progressive personnel involved in the handling of claims pertaining to its financial institutions D&O business asking them to identify any Litigation Claims of which they are aware. This email can be sent in conjunction with the email sent in relation to Section I above. Progressive will ensure that a response is received from each person to whom the email is sent confirming or denying any knowledge relating to the existence of such Litigation Claims. Progressive will advise FDIC-R when all such persons have responded. However, Progressive will not produce any such responses to FDIC-R. Progressive and/or ABAIS also will review summary information available electronically with respect to lawsuits filed by or against Progressive since January 1, 2004 in order to identify any that may involve one or more of the Litigation Issues.

With respect to each of the Litigation Claims identified through the foregoing procedure, or that otherwise come to the attention of Progressive, whether through its privilege review or otherwise, Progressive will review the Progress Documents, to the extent they exist for the respective Litigation Claims and to the extent they are available in the Progress system for the respective Litigation Claims.

If, based on this review of the Progress Documents, Progressive determines that one or more of the Litigation Claims appears to have involved one or more of the Litigation Issues set forth above, Progressive will review the entire paper and electronic files for such claims(s). Progressive will provide to FDIC-R a list of all Progress Documents reviewed with respect to each of the Litigation Claims. If

1 Progressive is unable to determine from the Progress Documents whether a Litigation
2 Claim involved any of the Litigation Issues or if Progress does not contain
3 information for a Litigation Claim, Progressive will notify FDIC-R of the number of
4 Litigation Claims in which it was unable to make such determination and the parties
5 will confer regarding what additional steps, if any, will be taken with respect to those
6 individual Litigation Claims.

7 If, based on further review of the paper and electronic files, Progressive
8 determines that one or more of the Litigation Claims did, in fact, involve one or more
9 of the Litigation Issues, with the exception of any discovery produced by Progressive,
10 Progressive will produce non-privileged portions of the file(s) related to such
11 Litigation Claims to FDIC-R and will provide a log identifying any documents
12 withheld or redacted on the basis of privilege. If Progressive produced discovery in
13 connection with any such Litigation Claim(s), Progressive and FDIC-R will meet and
14 confer in good faith to address whether Progressive will produce such discovery and,
15 if so, the circumstances of that production. Progressive may redact from all
16 documents produced identifying information pertaining to Progressive's Other
17 Insureds. If Progressive does so, though, Progressive will identify the documents in
18 such a way as to allow FDIC-R to determine which documents pertain to a particular
19 Litigation Claim.

20 Should FDIC-R obtain additional information identifying Litigation Claims
21 that involve the Litigation Issues, FDIC-R reserves the right to request the production
22 of documents relating to those claims. Progressive reserves the right to object to any
23 such requests.

24 **III. Communications Regarding Progressive's Other Insureds**

25 As noted in Section II.F of Progressive's supplemental brief, Progressive has advised
26 the FDIC-R that it would be amenable to the following with respect to the FDIC-R's requests
27 for discovery of communications regarding Progressive insureds other than the entities and
individuals insured under the policies at issue in this matter:

Progressive will not withhold from production documents that are otherwise
responsive to FDIC-R's requests for production and non-privileged solely on the
basis that they pertain to or reference Progressive's Other Insureds. Progressive may
redact identifying information from any such documents produced pertaining to such
Other Insureds but, if it does so, will identify the documents in such a way as to allow
FDIC-R to determine which documents pertain to a particular insured.

With respect to Progressive's communications with Cragin & Pike,
Progressive will produce non-privileged ESI identified through search terms pursuant
to the ESI protocol in the DJ Action reflecting such communications that is
responsive to FDIC-R's requests for production, regardless of whether they refer to
Silver State Bank or Progressive's Other Insureds. However, Progressive will not

1 perform an independent review of its hard-copy files or Progress entries other than
2 those pertaining to Silver State Bank or Western Alliance Bancorporation in order to
3 locate additional documents, if any, reflecting such communications. Progressive
4 will, however, produce any non-privileged documents that come to its attention that
5 are responsive to FDIC-R's requests for production and enter any such documents
6 withheld on the basis of privilege on its privilege log. Again, Progressive may redact
7 identifying information from any such documents produced pertaining to such Other
8 Insureds but, if it does so, will identify the documents in such a way as to allow
9 FDIC-R to determine which documents pertain to a particular insured.

10 Should FDIC-R obtain additional information regarding Progressive's Other
11 Insureds, FDIC-R reserves the right to request additional documents, including hard
12 copy files, relating to those Other Insureds. Progressive reserves the right to object to
13 any such requests.

14 **IV. Progressive's Motion for a Protective Order**

15 As discussed in Section II.I of Progressive's supplemental brief, except as it pertains
16 to the FDIC-R's requests for discovery of reserve and reinsurance information, Progressive is
17 amenable to the following with respect to its Motion for a Protective Order:

18 Progressive will withdraw its Motion for a Protective Order with respect to the
19 issues addressed therein. Progressive does so without prejudice to its right to file a
20 new or renewed motion for a protective order if FDIC-R serves Progressive with a
21 new deposition notice pursuant to Fed. R. Civ. Pro. 30(b)(6). Except as set forth
22 immediately below, if Progressive files a new or renewed motion for a protective
23 order in response to a new deposition notice served by FDIC-R on Progressive, absent
24 agreement between Progressive and FDIC-R, no deposition of Progressive will take
25 place before any such motion is resolved by the parties or the Court. If, however, any
26 such motion remains unresolved 45 days prior to the close of discovery in this matter,
27 Progressive and FDIC-R will cooperate in good faith to schedule such deposition to
occur prior to the expiration of the discovery period. In that event, Progressive would
retain the right to object to particular questions on any bases it deems appropriate,
including those that are the subject of the protective order. Nothing herein shall be
construed as agreement on the part of FDIC-R that any such objections would be
proper.